

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL ANGELO ESPARZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. C22-5961 BHS

ORDER

This matter is before the Court on Petitioner Michael Esparza's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Dkt. 1.

**I. BACKGROUND**

On May 17, 2021, the Court sentenced Esparza to 60 months and one day of imprisonment and three years of supervised release following his guilty plea to one count of Possession of Methamphetamine with Intent to Distribute and one count of Possession of a Firearm in Furtherance of a Drug Trafficking Crime. *United States v. Esparza*, 18-cr-5077 BHS, Dkts. 219, 251. Esparza did not appeal the Court's judgment.

On December 12, 2022, Esparza filed this § 2255 motion to vacate, set aside, or correct his sentence. Dkt. 1. Esparza appears to assert two claims of ineffective assistance

1 of counsel. *See id.* at 4–5. First, Esparza asserts that his attorney, Zenon Olbertz, “did  
2 nothing to prepare a defense of the charges and left [Esparza] with no alternative but to  
3 take the government’s [plea] offer” *Id.* at 5. Second, Esparza claims that Olbertz wrongly  
4 advised him that, upon being convicted of his offenses, he would qualify for the  
5 Residential Drug Abuse Program (RDAP) and receive time credits under the First Step  
6 Act, allowing him to serve only 24 months of his approximately 60-month sentence. *Id.*  
7 Esparza asserts, however, that his conviction for Possession of a Firearm in Furtherance  
8 of a Drug Trafficking Crime disqualifies him from both participating in RDAP and  
9 receiving time credits under the First Step Act. *Id.*

10       The Government argues that Esparza’s § 2255 motion is time-barred under  
11 § 2255(f)(1) because he did not file it within one year after the judgment of conviction  
12 became final on May 31, 2022. Dkt. 5 at 7–8. The Government also contends that both of  
13 Esparza’s ineffective assistance of counsel claims are without merit. The Government  
14 argues that Esparza’s first claim—that Olbertz did not prepare a defense—is meritless  
15 because a viable defense did not exist considering the weight of the evidence against  
16 Esparza. *Id.* at 9–10. The Government argues that Esparza’s second claim—that Olbertz  
17 wrongly advised him that he would qualify for RDAP and time credits under the First  
18 Step Act—is also without merit because his attorney neither grossly mischaracterized the  
19 outcome of a plea bargain nor provided erroneous advice on the probable effects of going  
20 to trial. *Id.* at 11. In so doing, however, the Government agrees with Esparza that his  
21 conviction for Possession of a Firearm in Furtherance of a Drug Trafficking Offense  
22 disqualifies him from both participating in RDAP and receiving time credits under the

1 First Step Act. *Id.* at 11 (citing 18 U.S.C. § 3621(e)(2)(B); 28 C.F.R. § 550.55(b)(5)(ii);  
2 18 U.S.C. § 3632(d)(4)(D)(xxii)).

3 Esparza replies that his motion is timely because he “was not fully aware of the  
4 consequences of the inadequate representation by counsel until after he arrived at FCI  
5 Sheridan” and “until he met with his case manager at FCI Sheridan Camp.” Dkt. 6 at 2–3.  
6 Esparza does not state when he either arrived at Federal Correctional Institution,  
7 Sheridan, or met with his case manager, but he asserts that he “was not in a position to  
8 file this Motion until December 2022.” *Id.* at 2.

9 The Government filed a surreply, arguing that Esparza’s motion is also untimely  
10 under § 2255(f)(4) because he could have known the facts supporting his second  
11 ineffective assistance of counsel claim before pleading guilty. Dkt. 7-1 at 4.<sup>1</sup> According  
12 to the Government, “Esparza could have discovered [his attorney’s] mistake” concerning  
13 whether he would qualify for RDAP or time credits under the First Step Act “simply by  
14 consulting . . . publicly-available statutes and regulations before pleading guilty.” *Id.*

15 Esparza responds that he was not required to research the legal consequences of  
16 his conviction before entering a guilty plea and that he was, instead, entitled to rely on the  
17 representations of his attorney. Dkt. 8 at 1–2.

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21 <sup>1</sup> Esparza responded to the substance of the Government’s surreply, but he did not oppose  
22 its motion to file that surreply. *See* Dkt. 8. Therefore, the Government’s unopposed motion for  
leave to file a surreply, Dkt. 7, is GRANTED.

## II. ANALYSIS

Motions filed under 28 U.S.C. § 2255 are subject to a one-year limitation period. 28 U.S.C. § 2255(f). Relevant to this motion, the one-year limitation period commences from the later of either “the date on which the judgment of conviction becomes final” or “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.”<sup>2</sup> 28 U.S.C. § 2255(f)(1), (4).

The Court first considers whether Esparza timely filed his motion within one year of the date on which the judgment of conviction became final. The Court entered the judgment of conviction on May 17, 2021. *Esparza*, 18-cr-5077 BHS, Dkt. 251. Esparza did not appeal his conviction. When a defendant does not appeal a conviction, “the conviction becomes final when the time for filing a direct appeal expires.” *United States v. Gilbert*, 807 F.3d 1197, 1199 (9th Cir. 2015). Had Esparza desired to file a notice of appeal, he was required to do so within 14 days after the Court entered the judgment. *See* Fed. R. App. P. 4(b)(1)(A)(i). Because he did not do so, the judgment of conviction became final on May 31, 2021. For Esparza’s motion to be timely under § 2255(f)(1), he was required to file it by May 31, 2022. He instead filed it in December 2022. Dkt. 1. Accordingly, Esparza’s motion is untimely under § 2255(f)(1).

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<sup>2</sup> The one-year limitation period may also commence on either (1) “the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action”; or (2) “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(2), (3). However, neither of these are applicable here.

1       The Court next analyzes when Esparza discovered (or could have discovered with  
2 reasonable diligence) the facts supporting his claims to determine whether either of  
3 these claims are timely under § 2255(f)(4). “[T]o have the factual predicate for a  
4 habeas petition based on ineffective assistance of counsel, a petitioner must have  
5 discovered (or with the exercise of due diligence could have discovered) facts  
6 suggesting both unreasonable performance *and* resulting prejudice.” *Hasan v.*  
7 *Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).<sup>3</sup> Furthermore, “[d]ue diligence does  
8 not require the maximum feasible diligence, but it does require reasonable  
9 diligence in the circumstances.” *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012)  
10 (internal quotation marks omitted) (quoting *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir.  
11 2004)).

12       Esparza’s claim that he pleaded guilty because his attorney did not prepare a  
13 defense for trial is untimely under § 2255(f)(4). To reiterate, Esparza argues that his  
14 attorney “did nothing to prepare a defense of the charges and left [him] no alternative but  
15 to take the government’s [plea] offer.” Dkt. 1 at 5. Esparza knew all the facts to support  
16 this claim when he pleaded guilty on November 23, 2020. *Esparza*, 18-cr-5077 BHS,  
17 Dkts. 219, 221 Accordingly, Esparza did not timely file this claim within one year under  
18 § 2255(f)(4).

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21       <sup>3</sup> *Hasan* involved a petition filed by a state prisoner pursuant to 28 U.S.C. § 2254. The  
22 statutory limitation periods applicable to a § 2254 petition are enumerated in § 2244. “[T]he  
Supreme Court has interpreted the statute-of-limitations provisions of § 2244 and § 2255 in  
concert with one another.” *Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005).

1           However, Esparza’s other claim—that his attorney incorrectly informed him that  
2 he would qualify for RDAP and time credits under the First Step Act—is timely. The  
3 Government argues that “Esparza could have discovered this mistake simply by  
4 consulting . . . publicly-available statutes and regulations before pleading guilty.” Dkt. 7-  
5 1 at 4. The Government asserts that Esparza therefore did not act with due diligence.

6           In *Harris v. Foulk*, 591 F. App’x 551, 552 (9th Cir. 2015), the Ninth Circuit  
7 rejected a similar argument. In that case, the defendant “was misinformed by both the  
8 trial court and his counsel that the length of any parole term would be five years when, in  
9 fact, he was subject to a lifetime parole term” under California Penal Code 3000.1. *Id.*  
10 The Ninth Circuit explained that the defendant “had no reason to doubt the correctness of  
11 those representations, or to conduct an independent investigation to determine their  
12 validity” when those representations were made. *Id.* The Ninth Circuit further explained  
13 that “[i]t was not until [the defendant’s] second parole suitability hearing . . . that [he]  
14 first became aware of the actual parole term to which he was subject.” *Id.* The Ninth  
15 Circuit held that he timely filed his habeas petition within one year of that hearing. *Id.*

16           Similarly, Esparza alleges that his attorney incorrectly informed him that, if he  
17 accepted the Government’s plea offer, he would qualify for RDAP and time credits under  
18 the First Step Act. Dkt. 1 at 5. On the record currently before the Court, Esparza had no  
19 reason to doubt the correctness of that representation or to conduct an independent  
20 investigation into its validity when his attorney made that representation. Esparza also  
21 claims that he first became aware that he did not qualify for RDAP or time credits under  
22 the First Step Act when he met with his case manager at FCI Sheridan. Dkt. 6 at 2–3.

1 Notably, Esparza does not state exactly when he first met with case manager, but he says  
2 that he “was not in a position to file this Motion until December 2022.” *Id.* at 2.

3 On this record, the Court cannot determine whether Esparza’s second ineffective  
4 assistance of counsel claim—that his attorney incorrectly informed him that he would  
5 qualify for RDAP and time credits under the First Step Act—is timely under  
6 § 2255(f)(4). The Court also cannot conclude whether this claim is meritorious.  
7 Accordingly, an evidentiary hearing is necessary to address these issues.

8 Because an evidentiary hearing is necessary, the Court appoints counsel to  
9 represent Esparza. *See* Rule 8(c) of the Rules Governing Section 2255 Proceedings for  
10 the United States District Courts.

### 11 **III. ORDER**

12 Therefore, Esparza’s 28 U.S.C. § 2255 motion to vacate, set aside, or correct his  
13 sentence, Dkt. 1, is **DENIED in part**. Esparza’s claim that his attorney provided  
14 ineffective assistance of counsel by not preparing a trial defense is untimely under  
15 § 2255(f). The Court **RESERVES RULING** on (1) whether Esparza timely filed the  
16 claim that his attorney incorrectly informed him that he would qualify for RDAP and  
17 time credits under the First Step Act; and (2) whether this claim is otherwise successful  
18 on the merits.

19 The Court **APPOINTS** counsel for Esparza and the Clerk shall assign Esparza  
20 counsel from the Court’s Criminal Justice Act Panel. After counsel has appeared, the  
21 parties shall consult and file a **JOINT STATUS REPORT** with potential dates for an  
22 evidentiary hearing by the end of business on **Wednesday, May 24, 2023**.

1 Dated this 10th day of May, 2023.

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4 BENJAMIN H. SETTLE  
5 United States District Judge  
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